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No. 04-1220

Supreme Court, U.S.
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In The

Supreme Court of the United States

BOBBY OSBURN,

Petitioner,

v.

ATLANTA CENTER FOR DERMATOLOGIC DISEASES AND DR. GILBERT GOLDMAN,

Respondents.

On Petition For Writ Of Certiorari To The Georgia Court Of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to consider Petitioner's claim that the Georgia statute of repose for medical malpractice actions (O.C.G.A. § 9-3-71(b)) is unconstitutional where the Georgia Court of Appeals followed binding precedent which continually found the statute to be constitutional?

2. Did Petitioner properly preserve her constitutional issue despite the fact that neither the trial court nor the Georgia Court of Appeals ruled upon the constitutionality of the statute of repose?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Atlanta Center for Dermatalogic Diseases does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioner filed a medical malpractice lawsuit against Respondents Dr. Gilbert Goldman and Atlanta Center for Dermatologic Diseases, P.C. for treatment Petitioner received from Respondent Dr. Goldman beginning on March 7, 1991 through December 18, 1995 for silicone injections for cosmetic purposes.

The underlying issue in this case and of this petition for certiorari is whether O.C.G.A. § 9-3-71(b), the five-year statute of ultimate repose in Georgia, acts to deny medical malpractice plaintiffs of equal protection and due process of the law whose injures manifest after five years after the act of alleged malpractice.

During various visits with Dr. Goldman, Petitioner was injected with liquid silicone to reduce the visibility of wrinkles on her face. Respondent Dr. Goldman first used these silicone injections on Petitioner's face on March 21, 1991. It is undisputed that she received her last silicone injection treatment from Dr. Goldman on December 18, 1995. Depending on which version of facts related by Petitioner is considered, she either began experiencing eruptions as early as the beginning of March 2000 or as late as March 30, 2000. Petitioner filed suit on March 15, 2002, six years and three months after the last alleged act of negligence on Dr. Goldman's part.

Respondent filed a motion for summary judgment in the State Court of Fulton County and was granted summary judgment on the issue of the five year statute of repose barring Petitioner's recovery for medical malpractice. (Petitioner's App. 8-9). The Court of Appeals for the State of Georgia subsequently affirmed the judgment of the trial court. (Petitioner's App. 1-7).

Further, while Petitioner argued in the trial court below that Dr. Goldman's fraud tolled the statute of repose, the trial court decided this issue adversely to Petitioner (Petitioner's App. 6, 8), and Petitioner does not seek review of that ruling in this Court.

Dispositive of the issue whether Petitioner has properly preserved error of the basis of her appeal is the opinion rendered by the Court of Appeals of the State of Georgia. The Court of Appeals found specifically that the constitutional challenge had not been raised and ruled on in the trial court, thereby depriving the appellate courts of jurisdiction. (Petitioner's App. 6). The Supreme Court of the State of Georgia denied Petitioner's petition for certiorari (Petitioner's App. 11).

Contrary to Petitioner's assertions, the State of Georgia's enactment of the five year statute of repose is rationally related to a legitimate legislative attempt to reduce the uncertainties and costs related to malpractice litigation long after the medical services have been rendered. *See Hanflik v. Ratchford*, 848 F.Supp. 1539 (N.D. Ga. 1994).

REASONS FOR DENYING THE PETITION

The decision below does not conflict with a decision of this Court, any Court of Appeals or any Court in the State of Georgia. As such, this Petition does not meet the requirements of Supreme Court Rule 10 to exercise the Court's supervisory power. At best, Petitioner complains of erroneous factual findings or the misapplication of a properly stated rule of law. "A petition for writ of certiorari is rarely granted when the asserted error consists of

erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

I. O.C.G.A. § 9-3-71(b) HAS REPEATEDLY BEEN FOUND CONSTITUTIONAL AND DOES NOT THEREFORE DENY EQUAL PROTECTION OR DUE PROCESS OF THE LAW.

"In no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred." *Hill v. Fordham*, 186 Ga. App. 354, 357, 367 S.E.2d 128 (1988).

While Petitioner complains of the inequitable and unjust results the statute of repose places on a medical malpractice plaintiff, the statute at issue has been found constitutional on a number of occasions. Petitioner admits that the statute in question has been ruled constitutional by the highest court in Georgia in *Craven v. Lowndes County Hosp. Auth.*, 263 Ga. 657, 437 S.E.2d 308 (1993). (Petitioner's Brief p. 13). Petitioner also overlooks the subsequent appellate cases which approve of the finding in *Craven*.

The appellate courts in Georgia reaffirmed the holding in *Craven* finding O.C.G.A. § 9-3-71(b) constitutional in *Waters v. Rosenbloom*, 268 Ga. 482, 490 S.E.2d 73 (1997) in which the plaintiff attacked the constitutionality of the statute and the Supreme Court of Georgia summarily adopted their own decision and holding in *Craven*. Further, in *Thompson v. Long*, 225 Ga. App. 719, 720, 484 S.E.2d 666, 667 (1997), plaintiff argued that: "the five year statute of repose is unconstitutional in that it arbitrarily distinguishes medical malpractice claimants from all other personal injury claimants and subjects medical malpractice

claimants to abrogation of their claims." The court rejected that argument and held that the Supreme Court of Georgia had already responded to the same argument in ruling that O.C.G.A. § 9-3-71(b) is constitutional.

In *Braden v. Bell*, 222 Ga. App. 144, 473 S.E.2d 523 (1996), the case was transferred from the Supreme Court of Georgia to the Court of Appeals of Georgia because the case involved the application of established constitutional law to the facts of the case. Importantly, the plaintiff in *Braden* raised the same arguments Petitioner does in the instant petition. In *Braden*, plaintiff alleged that the trial court erred by finding that O.C.G.A. § 9-3-71(b) does not violate the equal protection guarantees of the Constitutions of the State of Georgia and of the United States; erred by finding that the rational basis test was the proper standard to apply when considering whether O.C.G.A. § 9-3-71(b) violated the equal protection clauses, erred by failing to find that the five-year period in O.C.G.A. § 9-3-71(b) was arbitrary and erred by not finding that O.C.G.A. § 9-3-71(b) infringed on Braden's substantive rights. *Id.* at 146.

The court in *Braden* found that jurisdiction was properly in the Court of Appeals. It further found that because plaintiff's contention that O.C.G.A. § 9-3-71(b) was in some manner unconstitutional or was arbitrary and infringed upon plaintiff's rights had been raised and ruled upon prior, that the attacks on this statute were without merit. *Id.* Here, Petitioner alleges the same deficiencies of O.C.G.A. § 9-3-71(b) and for the same reasons given in the *Braden* case, their contentions are also without merit. (Petitioner's Brief pp. 8, 10, 12, 15).

Further underscoring the fact that there is no disagreement in federal or state courts about the constitutionality of O.C.G.A. § 9-3-71(b) which would warrant this Court's intercession is *Hanflik v. Ratchford*, 848 F.Supp. 1539 (N.D. Ga. 1994). In *Hanflik*, the district court examined the cases since the passage of O.C.G.A. § 9-3-71(b). It found that Georgia's statute of repose for medical malpractice claims is rationally related to a legitimate legislative attempt to reduce the uncertainties and costs related to malpractice litigation long after the medical services have been rendered. *Id.* at 1546-1547.

The finding in *Hanflik* was reiterated in 2004 in *Simmons v. United States*, 225 F.R.D. 688 (N.D. Ga. 2004). There, the district court held that the Georgia five year statute of repose acts as a complete bar to recovery, stating: "nothing stops the abrogation of the action by the statute of repose." *Id.* at 694.

Because all of Petitioner's arguments are directed to the constitutionality of O.C.G.A. § 9-3-71(b), and because Georgia state courts and federal courts have found O.C.G.A. § 9-3-71(b) to be constitutional no matter what the attack, Respondent's response to Petitioner's four separate but intertwined reasons for granting certiorari are addressed above.

Thus, it is clear based upon the continued approval of O.C.G.A. § 9-3-71(b) as constitutional, that change, if indeed there be any, come from the Georgia legislature and not from judicial intervention by this Honorable Court.

II. PETITIONER DID NOT PROPERLY PRESERVE ERROR IN THE COURTS BELOW AND THEREFORE HER PETITION TO THIS COURT IS FATALLY DEFECTIVE.

As found by the Court of Appeals in its order granting summary judgment to Respondents, Petitioner did not properly raise her constitutional challenge or have it ruled upon at the trial court level. "A constitutional issue cannot be considered when asserted for the first time on appeal but must be clearly raised in the trial court and distinctly ruled upon there." (Petitioner's App. 6, citing *In the Interest of A.A.*, 253 Ga. App. 858, 862, 560 S.E.2d 763 (2002)). In fact, Petitioner only summarily states her attack on the statute of repose and borrows almost verbatim from other attacks that have been made against the statute and have failed. (Petitioner's App. 14-15, 19-20, 23-24).

Therefore, this Court cannot consider what was not raised and distinctly ruled upon in any trial court or appellate court below.

CONCLUSION

Because the Georgia Court of Appeals has properly interpreted the law, Respondents pray that this Court DECLINE to grant certiorari to review the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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